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FOURTH AMENDMENT—MUST POLICE KNOCK AND ANNOUNCE THEMSELVES BEFORE KICKING IN THE DOOR OF A HOUSE?

Wilson v. Arkansas, 115 S. Ct. 1914 (1995)

I. INTRODUCTION

In *Wilson v. Arkansas*,¹ the United States Supreme Court addressed the question of whether an unannounced entry by police armed with a search warrant violates the Fourth Amendment.² This question had been left unanswered for over thirty years since the Court's ambiguous plurality decision in *Ker v. California* in 1963.³ The Court in *Wilson* answered the question tentatively, holding that under some circumstances an unannounced entry by police acting under the authority of a search warrant will violate the Fourth Amendment.⁴ The Court's holding was based entirely on historical grounds. After reviewing the history of the knock-and-announce rule,⁵ the Court held that police failure to announce their authority and purpose prior to a forced entry is merely a factor in a Fourth Amendment reasonableness determination.⁶

This Note argues that the Court should have held that unannounced entries are presumptively unreasonable under Fourth Amendment standards. Police should be allowed to enter a home only when they know that the occupants are already aware of the officers' authority and purpose, or when there is a reasonable suspicion,

¹ 115 S. Ct. 1914 (1995).

² The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

³ 374 U.S. 23 (1963).

⁴ *Wilson*, 115 S. Ct. at 1918.

⁵ The knock-and-announce rule requires police officers serving an arrest or search warrant at a home to knock, announce their authority and purpose, and wait for a reasonable period of time before forcibly entering the home. See, e.g., 18 U.S.C. § 3109 (1994) (codifying the common law knock-and-announce rule).

⁶ *Wilson*, 115 S.Ct. at 1918.

based on specific articulable facts, that an announced entry would result in danger to the officers or destruction of evidence. After examining the history and purposes of the knock-and-announce rule, this Note asserts that the Court improperly relied only on a historical analysis in its decision. By balancing the state's interest in unannounced entries against the occupants' Fourth Amendment interests, this Note concludes that the proposed rule would better protect the interests served by the knock-and-announce rule.

II. BACKGROUND

A. THE FOURTH AMENDMENT

1. *The Origins of the Fourth Amendment*

The Fourth Amendment was adopted as a response to the abusive search and seizure practices used by the British government during the American colonial period.⁷ The colonists were particularly concerned about broad, unparticularized searches performed under the authority of general warrants.⁸ General warrants authorized searches for persons or papers not named specifically in the warrant. The British government used general warrants in both England and America. In England, general warrants were widely used to suppress seditious publications.⁹ One particularly influential incident involved the *North Briton*, a series of pamphlets criticizing government policies published anonymously by John Wilkes, a member of Parliament.¹⁰ After a particularly critical issue of the pamphlet was published, the Secretary of State issued a general warrant to search for the people who published the pamphlets.¹¹ Wilkes and others who had been searched and arrested challenged the warrant issued against them.¹²

⁷ For the historical background of the Fourth Amendment, see generally JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT 19-48* (1966); NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13-106* (1937); William Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 602-1791 (unpublished Ph.D. dissertation, Claremont College 1990).

⁸ See, e.g., LANDYNSKI, *supra* note 7, at 30-31.

⁹ *Marcus v. Search Warrants*, 367 U.S. 717, 724 (1961). See also LANDYNSKI, *supra* note 7, at 20-30; LASSON, *supra* note 7, at 42.

¹⁰ LASSON, *supra* note 7, at 43-46.

¹¹ The warrant involved in the *North Briton* incident authorized four messengers of the Secretary of State "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, *The North Briton*, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers." *Id.* at 43. As the publication had been printed anonymously, the agents had complete discretion in determining whom to arrest and what to seize. The four agents arrested forty-nine people in the three days following the issuance of the warrant. *Id.* at 43-44.

¹² *Id.* at 45.

In *Wilkes v. Wood*, the King's Bench held the warrant illegal.¹³

In colonial America, general warrants were used to ferret out smugglers.¹⁴ These warrants, called writs of assistance, were issued to customs officials by the colonial courts.¹⁵ Writs of assistance commanded all subjects of the Crown to assist the officer executing the writ.¹⁶ The writs authorized customs officials and their subordinates to search anywhere they thought smuggled goods would be hidden and to break open containers suspected of holding smuggled goods.¹⁷ A customs official possessing a writ of assistance had "practically absolute and unlimited" discretion as to how the writ could be executed.¹⁸ A particularly offensive feature of these writs was that they served as permanent search warrants, effective until six months after the death of the reigning sovereign.¹⁹ These writs inspired resentment throughout the colonies,²⁰ and after the revolution, seven states enacted constitutional prohibitions against general warrants.²¹

Although these abuses were the primary targets of the Framers of the Fourth Amendment,²² the congressional debates on the Fourth Amendment clearly demonstrate that the focus of the Amendment extended beyond general warrants.²³ As originally proposed in Congress, the Fourth Amendment only protected against general warrants.²⁴ However, during the debates on the Amendment, objections

¹³ 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (K.B. 1763). The *North Briton* incident sparked a series of cases in which the English courts spoke against the evils of general warrants. The most influential of these cases was *Entick v. Carrington*, 19 How. St. Tr. 1030, 95 Eng. Rep. 807 (K.B. 1765). LANDYNSKI, *supra* note 7, at 29. *Entick* has been long recognized by the United States Supreme Court as a guide to the thoughts of the Framers of the Fourth Amendment on unreasonable searches. See *Boyd v. United States*, 116 U.S. 616, 626-27 (1886). To this day, the Court still relies on *Entick* in its cases on search and seizure. E.g., *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

¹⁴ LANDYNSKI, *supra* note 7, at 30.

¹⁵ *Id.* at 32.

¹⁶ *Id.* at 22.

¹⁷ LASSON, *supra* note 7, at 54. One of the few restrictions on the discretion of the customs official was that buildings could only be searched during the daytime. A civil officer also had to be present when the writ was executed. *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ LANDYNSKI, *supra* note 7, at 36-37. Writs of assistance were primarily used in Massachusetts, and outrage over them was an important factor in stirring up revolutionary sentiment in that colony. *Id.* at 31, 37.

²¹ LASSON, *supra* note 7, at 79-82. The states were Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Vermont, and Virginia. *Id.* at 82. In addition, Connecticut's constitution had a vague provision relating to illegal searches and seizures. *Id.* at 82 n.17.

²² *Payton v. New York*, 445 U.S. 573, 585 (1980).

²³ See LASSON, *supra* note 7, at 100-03.

²⁴ As originally proposed in the House, the Fourth Amendment read: "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by

to the narrow focus of the Amendment's protections were raised, and the Amendment's final text contained a clause protecting against any unreasonable search.²⁵

This history has persuaded the Supreme Court to recognize that the Fourth Amendment's Unreasonable Search Clause protects rights beyond those protected by the Warrant Clause.²⁶ Thus, the Court has interpreted the Unreasonable Search Clause to apply even to searches made with a warrant.²⁷

2. *The Reasonableness Standard*

The standard of reasonableness, based on the Unreasonable Search Clause, has emerged as the primary test of whether a given search is constitutional under the Fourth Amendment.²⁸ The reasonableness standard first surfaced in the Court's Fourth Amendment cases of the late 1940s and early 1950s, such as *United States v. Rabinowitz*,²⁹ where the Court used reasonableness to determine the proper scope of a search incident to an arrest. However, the Court did not fully develop the doctrine until *Camara v. Municipal Court*³⁰ and *Terry v. Ohio*,³¹ where the Court used reasonableness to fashion broad ex-

warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized." LASSON, *supra* note 7, at 101 (emphasis added).

²⁵ The second draft of the Amendment changed the wording to:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, *shall not be violated by warrants* issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.

Id. (emphasis added). This provision still clearly prohibits only the acts described in the original proposal, as noted during the Congressional debate:

Mr. Benson objected to the words "by warrants issuing." This declaratory provision was good as far as it went, but *he thought it was not sufficient*; he therefore proposed to alter it so as to read "and no warrant shall issue."

The question was put on this motion, and lost by a considerable majority.

Id. (quoting 1 ANNALS OF CONG. 783 (1789)) (emphasis added).

Though the proposal was originally defeated in the House, Benson's change was eventually adopted and became the Fourth Amendment. *Id.* at 102. For the final text of the Fourth Amendment, see *supra* note 2.

²⁶ *Payton*, 445 U.S. at 584-85. See also LASSON, *supra* note 7, at 103. But see LANDYNSKI, *supra* note 7, at 43 (arguing that the Unreasonable Search Clause only emphasizes the Warrant Clause).

²⁷ The Court has found searches conducted under proper warrants unreasonable. *E.g.*, *Winston v. Lee*, 470 U.S. 753, 763-66 (1985) (holding the court-ordered surgical removal of a bullet from a suspect unreasonable); *Boyd v. United States*, 116 U.S. 616 (1886) (holding a search for personal papers under warrant unreasonable).

²⁸ 1 JOHN WESLEY HALL, JR., SEARCH AND SEIZURE § 1:19, at 27 (1991).

²⁹ 339 U.S. 56, 65-66 (1950), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969).

³⁰ 387 U.S. 523, 536-37 (1967) (reasonableness used to exempt municipal inspectors from the warrant requirement).

³¹ 392 U.S. 1 (1968) (applying reasonableness to create reasonable suspicion standard

ceptions to the warrant requirement. Most cases invoking the reasonableness standard have involved warrantless searches and seizures, but the Court also applies the standard to cases involving valid warrants.³²

The reasonableness standard balances a state's legitimate governmental interests against the extent to which a questioned practice intrudes upon an individual's Fourth Amendment interests.³³ Reasonableness is determined based on the facts known to the police at the time the intrusion occurs.³⁴ In evaluating the legitimacy of the governmental interests involved, the Court considers the degree to which law enforcement will be hindered if a practice is not allowed.³⁵ The Court may also look to prevailing rules in individual jurisdictions and the historical pedigree of a practice to determine reasonableness.³⁶ While the Court will not merely rubber stamp a practice because it is long established, a "clear consensus among the States" is carefully considered by the Court.³⁷ Likewise, the judgment of Congress that a practice is reasonable also carries weight with the Court.³⁸

B. THE PURPOSES OF THE KNOCK-AND-ANNOUNCE REQUIREMENT

Like the Fourth Amendment, the knock-and-announce rule protects the security, privacy, and property interests of people in their homes. The knock-and-announce rule requires that police officers give notice of both their authority and purpose to the occupants of a

for justifying police "stop and frisk" searches).

³² *E.g.*, *Dalia v. United States*, 441 U.S. 238, 258 (1980) (applying reasonableness to a search conducted pursuant to a valid warrant); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (same).

³³ *Delaware v. Prouse*, 440 U.S. 648, 653-55 (1979). The balancing of interests under the rubric of reasonableness is the "key principle" of the Fourth Amendment. *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981). The Fourth Amendment protects people's "privacy, dignity, and security" interests against "certain arbitrary and invasive acts by officers of the Government or those acting at their direction." *Skinner v. Railway Labor Exec. Ass'n.*, 489 U.S. 602, 613-14 (1989).

³⁴ *U.S. v. Jacobsen*, 466 U.S. 109, 115 (1984).

³⁵ *See, e.g.*, *Payton v. New York*, 445 U.S. 573, 602 (1980); *United States v. Watson*, 423 U.S. 411, 417 (1976). The unavailability of a practice must seriously hinder law enforcement for the Court to be swayed. *See id.* Mere inconvenience to law enforcement interests will not move the Court. *See Steagald v. United States*, 451 U.S. 204, 222 (1981). The Court looks at local police department policies to determine the extent to which departments actually rely on a particular practice. *Tennessee v. Garner*, 471 U.S. 1, 18-19 (1985).

³⁶ *Garner*, 471 U.S. at 13-18; *Watson*, 423 U.S. at 420-22. The degree to which the Court has relied on history for determining reasonableness is discussed *infra* at notes 215-246 and accompanying text.

³⁷ *Payton*, 445 U.S. at 590, 600 (clear consensus of states particularly helpful "when the constitutional standard is as amorphous as the word 'reasonable' and when custom and contemporary norms necessarily play such a large role in the constitutional analysis").

³⁸ *Id.* at 590.

residence to be searched.³⁹ Before breaking and entering the premises to search, officers must also give the occupants a reasonable opportunity to voluntarily allow the police to enter.⁴⁰ Police officers must follow the knock-and-announce rule regardless of whether they have a warrant, because the knock-and-announce rule serves several important purposes.⁴¹

First, the rule reduces the risk of violence during a police entry. A forced, unannounced entry is "conducive to a violent confrontation between the occupant and individuals who enter his home without proper notice."⁴² Unannounced entries put the officers involved at risk of being shot by frightened homeowners.⁴³ Moreover, the rule also reduces the risk to innocent persons who may be in the house at the time of the search.⁴⁴ Second, the rule protects the privacy inter-

³⁹ 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 4.8(c) (3d ed. 1996). The rule also applies to arrests. *Id.* § 6.2.

⁴⁰ Courts have been reluctant to adopt bright line standards as to what constitutes a reasonable amount of time. *State v. Thurman*, 846 P.2d 1256, 1261-62 (Utah 1993). If exigent circumstances exist, courts have found very short periods of time sufficient to comply with the rule. *E.g.*, *People v. Saechao*, 544 N.E.2d 745, 750 (Ill. 1989) (five to ten seconds; officers were "in a vulnerable position" after unlatched door opened from force of the officer's knock, and officers heard no response after knocking and loudly announcing their presence). When exigent circumstances do not exist, courts will generally find such short periods of time insufficient. *E.g.*, *People v. Polidori*, 476 N.W.2d 482, 485 (Mich. Ct. App. 1991), *cert. denied*, 113 S. Ct. 298 (1992) (three to six second wait insufficient in absence of exigent circumstances).

⁴¹ *E.g.*, *Miller v. United States*, 357 U.S. 301 (1958) (applying knock-and-announce rule to a warrantless entry); *United States v. Becker*, 23 F.3d 1537 (9th Cir. 1994) (applying knock-and-announce rule to an entry pursuant to a warrant).

⁴² *Duke v. Superior Court*, 461 P.2d 628, 633 (Cal. 1969) (en banc).

⁴³ At common law, courts worried that unannounced officers would be mistaken for trespassers.

[I]f no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost. *Launock v. Brown*, 2 B. & Ald. 591, 594, 106 Eng. Rep. 482, 483 (K.B. 1819). More recently, Justice Jackson pointed out the dangers involved in modern unannounced entries:

The method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than to foresight. Many homeowners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.

McDonald v. United States, 335 U.S. 451, 460-61 (1948) (Jackson, J., concurring).

⁴⁴ *Duke*, 461 P.2d at 632-33. For example, Wilson's eleven year old son and another couple were in the living room of the house when the police entered. Brief for Respondent at 3, *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995) (No. 94-5707).

ests of the occupants of the house.⁴⁵ Although there is obviously no right to refuse entry to an officer armed with a valid search warrant,⁴⁶ the occupants of a house to be searched have a privacy interest in activities not subject to the warrant.⁴⁷ Additionally, making the police request entry minimizes the possibility of a forced entry into the wrong home,⁴⁸ and legitimizes the intrusion.⁴⁹ Third, requiring police to knock and announce before forcibly entering a residence protects the homeowner's property interests.⁵⁰ A person should be given the opportunity to voluntarily submit to a search before having his property damaged.⁵¹ When there is no property damage,⁵² courts tend to be more lenient towards police noncompliance with the announcement rule.⁵³

C. HISTORICAL OVERVIEW OF THE KNOCK-AND-ANNOUNCE RULE

1. *English Common Law Predecessors*

The common law knock-and-announce rule was first judicially recognized in 1603.⁵⁴ In *Semayne's Case*, the Court of King's Bench stated:

⁴⁵ *Sabbath v. United States*, 391 U.S. 585, 589 (1968); *Miller v. United States*, 357 U.S. 301, 313 (1957).

⁴⁶ *State v. Valentine*, 504 P.2d 84 (Or. 1972) (en banc), cert. denied, 412 U.S. 948 (1973).

⁴⁷ Allowing a minute for the occupants of the house to answer can prevent them from being embarrassed by a police entry. For example, in *Hall v. Shipley*, 932 F.2d 1147 (6th Cir. 1991), officers used a battering ram to enter Hall's home when they heard noise from inside that they thought was the sound of evidence being destroyed. What they actually heard was Hall having sex with his girlfriend. Hall was detained in the nude. *Id.* at 1148.

⁴⁸ *United States v. Lockett*, 919 F.2d 585, 588 (9th Cir. 1990).

⁴⁹ *People v. Casias*, 563 P.2d 926, 933 n.12 (Colo. 1977) (en banc) ("Advising a citizen whose house is about to be searched pursuant to a warrant gives additional legitimacy to the procedure in the eyes of the citizen.").

⁵⁰ Lord Mansfield gave this eloquent defense of the knock-and-announce rule:

The ground of it is this; that otherwise the consequences would be fatal: for it would leave the family within, naked and exposed to thieves and robbers. It is much better therefore, says the law, that you should wait for another opportunity, than do an act of violence, which may probably be attended with such dangerous consequences.

Lee v. Ganser, 1 Cowp. 1, 6-7; 98 Eng. Rep. 935, 938 (K.B. 1774).

⁵¹ 2 LAFAYE, *supra* note 39, § 4.8(a). See also *State v. Carufel*, 314 A.2d 144, 147 (R.I. 1974).

⁵² For example, if entry is achieved with a pass key or via a ruse.

⁵³ The "mild exigency" cases bear this out. A lower showing of exigency can sometimes justify noncompliance with the knock-and-announce rule when entry can be achieved without destruction of property. See *United States v. Von Willie*, 59 F.3d 922 (9th Cir. 1995) (officer, fearing violence, entered through partially opened door prior to announcement); *United States v. Sagaribay*, 982 F.2d 906 (5th Cir. 1993) (officers, fearing that heroin inside the house would be destroyed, entered with a passkey while simultaneously announcing authority and purpose). See also 2 LAFAYE, *supra* note 37, § 4.8(e).

⁵⁴ See *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603). The origins of the rule substantially predate *Semayne's Case*. The case relies on statutes that date back to the year 1275. *E.g.*, 1 Edw., ch. 17.

In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . for the law without default in the owner abhors destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it,⁵⁵

The broad holding of *Semayne's Case* was adopted by the foremost English treatise writers of the period.⁵⁶ While there was argument among the treatise writers over the circumstances in which doors could be broken at all,⁵⁷ there was no disagreement over the rule that when doors were to be broken, even on a warrant for a felony, announcement was a precondition to the breaking.⁵⁸ The rule was also present in books intended for those executing such warrants.⁵⁹ The presence of announcement requirements in these books strongly suggests that announcement was a widespread practice at common law during the Eighteenth Century.

The first reported application of the announcement requirement in a criminal case was in *Curtis' Case*.⁶⁰ In that case, the Court of King's Bench held that officers who were serving an arrest warrant for breach of the peace could break down doors after "having demanded admittance and given due notice of their warrant."⁶¹ The court did

⁵⁵ *Semayne's Case*, 77 Eng. Rep. at 195-96 (citations omitted).

⁵⁶ See 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 52-56 (1819); 4 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 177; MICHAEL FOSTER, CROWN LAW 320 (3d ed. 1792); 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 583; 2 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 116-17; 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 138-39 (6th ed. 1738).

⁵⁷ For example, there was a disagreement over whether an officer could break down doors to arrest upon "probable suspicion" of a felony. Coke and Hawkins thought officers could not do so, while Hale and Blackstone thought officers could. See G. Robert Blakey, *The Rule of Announcement And Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499, 502 (1964).

⁵⁸ For example, Hawkins said:

[t]he law doth never allow of such extremities but in cases of necessity; and therefore, That no one can justify the breaking open another's doors to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance.

HAWKINS, *supra* note 56, at 138. See also 2 HALE, *supra* note 56, at 116-17 ("If a justice of the peace issues a warrant to apprehend a felon, who is in his own house, and after notice of the warrant and request to open the door it is refused or neglected to be done, the officer may break open the door to take him. . . .").

⁵⁹ E.g., 1 JOHN BURN, JUSTICE OF THE PEACE AND THE PARISH OFFICER 121-22 (17th ed. 1793) (follows Hawkins).

⁶⁰ FOST. 135, 168 Eng. Rep. 67 (K.B. 1757).

⁶¹ *Id.*, 168 Eng. Rep. at 68.

not require the officers to recite any particular formula to satisfy the notice requirement. Rather, the court held that "it is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority. . . ." ⁶²

The English courts affirmed this holding in subsequent criminal cases.⁶³ Although no early English case specifically excludes felony cases from the announcement rule, the extent to which the rule applied in felony cases remains unclear.⁶⁴ An early nineteenth-century decision reserved the question of applying the notice requirement to felonies.⁶⁵ In light of the unqualified comments found in contemporary treatises, however, it appears that announcement did occur in most, if not all, cases of criminal arrests in the home, regardless of whether the suspect was wanted for a felony or other crime.

2. *Transplanting the Rule to America*

The knock-and-announce rule was embraced in the United States prior to the ratification of the Constitution.⁶⁶ Between 1777 and 1786, ten states passed statutes requiring announcement prior to the forcible entry of a dwelling to conduct a search.⁶⁷ For example, a 1782 New York statute allowed a constable with a search warrant "to break open the doors of any house or outhouse, for the purpose of making any [contraband] search, if admittance shall be refused."⁶⁸ In addition, popular legal manuals for justices of the peace published in America at the time of the Fourth Amendment's adoption also required announcement prior to a forcible entry to arrest.⁶⁹

⁶² *Id.*

⁶³ *E.g.*, *Launock v. Brown*, 2 B. & Ald. 592, 593, 106 Eng. Rep. 482, 483 (K.B. 1819); *Burdett v. Abbot*, 14 East. 1, 162-63, 104 Eng. Rep. 501, 563 (K.B. 1811).

⁶⁴ *Blakey*, *supra* note 57, at 503.

⁶⁵ *See Launock*, 106 Eng. Rep. at 483. The Court of King's Bench split on the issue of applying announcement to felonies in *Launock*. Chief Judge Abbott stated that "[i]t is not at present necessary for us to decide how far, in the case of a person charged with felony, it would be necessary to make a previous demand of admittance before you could justify breaking open the outer door of his house. . . ." *Id.* However, Judge Bailey did not limit his comments to misdemeanors: "[E]ven in the execution of criminal process, you must demand admittance before you can justify breaking open the outer door." *Id.*

⁶⁶ Writs of assistance were apparently executed with a notice requirement. *See Ker v. California*, 374 U.S. 23, 51 (1963) (Brennan, J., concurring and dissenting); Note, *Announcement in Police Entries*, 80 YALE L. J. 139, 144-45 (1970).

⁶⁷ 2 Cuddihy, *supra* note 7, at 1513. Statutes prohibiting unannounced forced entries were passed in Connecticut, Georgia, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, and Virginia. *See id.* at 151-52 n.297-300 for citations.

⁶⁸ Act of April 13, 1782, ch. 39, § 3, 1 N.Y. ST. LAWS 480.

⁶⁹ 2 Cuddihy, *supra* note 7, at 1511. Cuddihy believes that all such manuals required the knock-and-announce rule, and he cites three examples: CONDUCTOR GENERALIS, THE SOUTH CAROLINA JUSTICE, and THE OFFICE AND AUTHORITY OF A JUSTICE OF THE PEACE. *Id.* at

In America, announcement was the general rule for forcible entries into homes.⁷⁰ Early American cases show that announcement was made in cases ranging from minor infractions to serious crimes.⁷¹ For example, in *State v. Shaw*,⁷² officers announced themselves prior to a forced entry on a warrant for lewd conduct. Announcement was also made in cases involving entry pursuant to a search warrant.⁷³ Even service of a warrant for treason, a capital offense, was preceded by a demand for entry.⁷⁴ Although no cases held a search pursuant to a warrant illegal because of a failure to give notice prior to entry, in *McLennon v. Richardson*,⁷⁵ a warrantless entry to arrest was held illegal in part because of an officer's failure to announce prior to entry.⁷⁶ In light of the comments found in early cases, the lack of cases declaring an unannounced search illegal is probably due more to the fact that officers did generally announce their authority and purpose before entering, rather than to the non-existence of an announcement policy in the courts.⁷⁷

Among the early cases, only *Hawkins v. Commonwealth*⁷⁸ rejected the knock-and-announce policy in criminal cases per se. In *Hawkins*, officers broke into a house to serve an arrest warrant.⁷⁹ The Kentucky Court of Appeals thought that announcement gave offenders the opportunity to escape capture, and therefore did not require announcement prior to a forced entry.⁸⁰ On the other hand, in the few other early cases where notice was held unnecessary prior to a forced entry,

1511-12. The first two of these reprint Hawkins' emphatic statement, cited *supra* note 58. 2 Cuddihy, *supra* note 7, at 1511.

⁷⁰ Blakey, *supra* note 57, at 504-08 (collecting cases).

⁷¹ Cases involving announcement by an officer serving criminal process include *Jacobs v. Measures*, 79 Mass. 74 (1859) and *Barnard v. Bartlett*, 64 Mass. 501 (1852).

⁷² 1 Root 134 (Conn. 1789).

⁷³ *E.g.*, *Chipman v. Bates*, 15 Vt. 51 (1843); *Bell v. Clapp*, 10 Johns. 263 (N.Y. Sup. Ct. 1813).

⁷⁴ *Kelsey v. Wright* involved a forced entry on a warrant for treason. 1 Root 83 (Conn. 1783). The entry was preceded by an announcement of purpose and a demand for entry, which was refused. The court held that the entry was legal. *Id.*

⁷⁵ 81 Mass. 74 (1860).

⁷⁶ *McLennon* involved a warrantless, unannounced entry for liquor and Sabbath violations observed by an officer. *Id.* The court held the officer's warrantless entry illegal, and then said:

Besides, he could not break open the door without first "demanding entrance"; the answer does not aver that any demand for entrance was made; nor does the proof show that any such demand was made as to give the plaintiff notice that the defendant, as an officer of the law, sought an entrance into his premises.

Id. at 77-78 (emphasis added).

⁷⁷ Blakey, *supra* note 57, at 506-07.

⁷⁸ 53 Ky. 318 (1854).

⁷⁹ *Id.* at 320.

⁸⁰ *Id.* at 319-20. However, the court did require compliance with the knock-and-announce rule when officers were serving civil process. *Id.* at 319.

the courts merely found the rule inapplicable under the particular circumstances presented in the case.⁸¹

D. THE KNOCK-AND-ANNOUNCE REQUIREMENT TODAY⁸²

Today, forty-three states and the federal government recognize the knock-and-announce rule.⁸³ The federal government adopted the knock-and-announce rule by statute in 1917.⁸⁴ Thirty-three states and the District of Columbia have statutes requiring prior notice for a forcible entry either to arrest or search.⁸⁵ Nine other states impose the knock-and-announce rule by judicial decision.⁸⁶

American courts have developed three exceptions to the announcement rule that apply in exigent circumstances: (1) apprehen-

⁸¹ All of these cases fit very clearly into the "exigent circumstances" exceptions which apply to the knock-and-announce rule today. *E.g.*, *Androscoggin R.R. Co. v. Richards*, 41 Me. 233 (1856) (no notice given when search warrant served on an empty building); *Howe v. Butterfield*, 58 Mass. 302, 305 (1849) (defendant had no "cause to suppose, that any person was in the house," and those inside were there in order to resist execution of process; "[a] demand, therefore, would have been useless. . ."); *Allen v. Martin*, 10 Wend. 300 (N.Y. Sup. Ct. 1833) (no notice given, officer in fresh pursuit of offender).

⁸² See generally James O. Pearson, Jr., Annotation, *What Constitutes Compliance with Knock-and-Announce Rule in Search of Private Premises—State Cases*, 70 A.L.R.3d 217 (1976 & Supp. 1995); Marvin O. Meier, Annotation, *What Constitutes Violation of 18 U.S.C. § 3109 Requiring Federal Officer to Give Notice of His Authority and Purpose Prior to Breaking Open Door or Window or Other Part of House to Execute Search Warrant*, 21 A.L.R. FED. 820 (1974 & Supp. 1995).

⁸³ See Jennifer M. Goddard, Note, *The Destruction of Evidence Exception to the Knock-and-Announce Rule: A Call for the Protection of Fourth Amendment Rights*, 75 B.U. L. REV. 449, 458-59 (1995) (collecting state statutes and cases).

⁸⁴ Espionage Act of 1917, Tit. XI, § 8-9, 40 Stat. 217, 228-29 (enacted June 15, 1917) (now codified at 18 U.S.C. § 3109). The original requirement was in two parts. The two sections read:

§ 8. The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance.

§ 9. He may break open any outer or inner door or window of a house, for the purpose of liberating a person who, having entered to aid him in the execution of the warrant, is detained therein, or when necessary for his own liberation.

Id. Though the measure was passed as a part of an espionage act, Congress intended the rule to apply beyond espionage cases. See *Giles v. United States*, 284 F. 208 (1st Cir. 1922); see also Charles P. Garcia, Note, *The Knock-and-Announce Rule: A New Approach to the Destruction-of-Evidence Exception*, 93 COLUM. L. REV. 685, 690 (1993) (outlining congressional intent on knock-and-announce provisions of the Espionage Act of 1917).

The two sections were condensed into the current 18 U.S.C. § 3109 in 1948. Act of June 25, 1948, ch. 645, § 1, 62 Stat. 820. The current code reads:

§ 3109. Breaking doors or windows for entry or exit

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 U.S.C. § 3109 (1994).

⁸⁵ Goddard, *supra* note 83, at 458-59.

⁸⁶ *Id.*

sion of peril, (2) useless gesture, and (3) destruction of evidence. The oldest of these is the apprehension of peril exception.⁸⁷ The exception is triggered when officers executing a warrant have a reasonable belief that an announcement prior to entry will increase the likelihood of injury to either themselves or others. Modern courts are generally sympathetic to the police when the police know the suspect is armed and the surrounding circumstances indicate danger.⁸⁸ However, the fact that a suspect is known to have a weapon is not enough on its own to trigger the exception.⁸⁹ Announcement is excused when, in addition to knowledge that the occupant of a house is armed, the police are investigating a violent crime,⁹⁰ or have specific knowledge that a suspect has used a weapon criminally or threatened to use a weapon to avoid arrest.⁹¹ At the outer limits of the exception, courts sometimes allow entries when the police do not know if a suspect is armed, but the circumstances at the scene are sufficiently

⁸⁷ The earliest example of the exception is *White & Wiltshire*, 2 Rolle 137, 81 Eng. Rep. 709 (K.B. 1619) (allowing sheriff to break down plaintiff's door when sheriff's bailiffs had been imprisoned in the plaintiff's dwelling on a previous attempt to seize the plaintiff). The earliest use of the exception in America occurred in *Read v. Case*, 4 Conn. 166 (1822). In that case, an unannounced entry into Read's home was justified on the basis of Read's threats to resist arrest with a gun. *Id.* at 170. See generally Kemal A. Mericli, *The Apprehension of Peril Exception to the Knock-and-Announce Rule*, 16 SEARCH AND SEIZURE L. REP. 129 (1989); Annotation, *Sufficiency of Showing of Reasonable Belief of Danger to Officers or Others Excusing Compliance with "Knock and Announce" Requirement—State Criminal Cases*, 17 A.L.R.4th 301 (1982).

⁸⁸ *Trosper v. State*, 721 P.2d 134, 135 (Alaska Ct. App. 1986) (requiring only "mild indication of exigency" under this exception). Mild exigencies are likely to be sufficient when the entry can be accomplished without destruction of property, police have partially complied with the rule, and the occupant of the home arguably knows that the people at the door are police. 2 LAFAYETTE, supra note 39, § 4.8(e). See, e.g., *United States v. Kovac*, 795 F.2d 1509, 1513 (9th Cir. 1986) (officers saw defendant move away from the door after they knocked), *cert. denied*, 479 U.S. 1065 (1987).

⁸⁹ See *United States v. Lucht*, 18 F.3d 541 (8th Cir.) (unannounced entry illegal even though police knew suspect had weapons in house, because police had no indication that suspect was violent or inclined to use the weapons), *cert. denied*, 115 S. Ct. 363 (1994); *Poole v. United States*, 630 A.2d 1109, 1118 (D.C. App. 1993) (evidence that a suspect has a weapon "insufficient," police must also show reason to believe "there was a realistic possibility that the occupant or occupants would use the weapons against them"), *cert. denied*, 115 S. Ct. 160 (1994). But see *United States v. Buckley*, 4 F.3d 552, 558 (7th Cir. 1993) (unannounced entry legal where "the officers knew that the defendants possessed a pit bull and firearms"), *cert. denied*, 114 S. Ct. 1084 (1994).

⁹⁰ E.g., *Poole*, 630 A.2d at 1109 (fact that police were investigating an armed robbery, and suspect had been charged with assaulting a police officer excused delay of only ten seconds after announcement prior to forcible entry); *Power v. State*, 605 So. 2d 856, 862-63 (Fla. 1992) (invoking exception because police were investigating a murder, and the suspect had committed armed robbery of a deputy, and also had used a gun or a knife in several rapes), *cert. denied*, 507 U.S. 1037 (1993).

⁹¹ *People v. Hardin*, 535 N.E.2d 1044, 1045-46 (Ill. App. Ct. 1989) (officers had previously been threatened while serving similar warrant on defendant).

threatening.⁹²

The second exception to the knock-and-announce rule is the "useless gesture" exception.⁹³ Courts regard announcement as a "useless gesture" when the occupants of the house already have notice of the officers' purpose and authority.⁹⁴ Thus, if the police are in hot pursuit of a suspect, notice is not required.⁹⁵ Similarly, announcement is not required when police know a dwelling is vacant or the occupants are not home.⁹⁶ Where the occupants' conduct at the scene of the entry is used to justify an unannounced entry under the useless gesture exception, courts generally follow the Supreme Court's guidelines from *Miller v. United States*.⁹⁷ The *Miller* test provides that officers need to be "virtually certain" that the occupants of a house are aware of the officers' authority and purpose.⁹⁸ Relevant facts justifying a "virtually certain" belief include a suspect's knowledge that the police are looking for him,⁹⁹ the police noticing that the house's occupants observed their arrival,¹⁰⁰ and the sound of people running from the door.¹⁰¹

The third exception to the knock-and-announce rule is known as the destruction of evidence exception.¹⁰² This exception allows police to forego announcement if they have "reasonable cause to believe" that announcement would "endanger the successful execution of the

⁹² See *State ex rel. Juvenile Dept. of Multnomah Cty. v. Qutub*, 706 P.2d 962, 964-66 (Or. Ct. App.) (suspect had "vowed not to return to prison," and was considered dangerous), *review denied*, 710 P.2d 147 (Or. 1985).

⁹³ *Miller v. United States*, 357 U.S. 301, 310 (1958).

⁹⁴ The useless gesture exception stems from the notion that if the occupants realize the purpose of the police visit, the purpose of the knock-and-announce rule has been satisfied.

⁹⁵ E.g., *United States v. Flores*, 540 F.2d 432, 435 (9th Cir. 1976); *United States v. Cisneros*, 448 F.2d 298, 304 (9th Cir. 1971). This exception was recognized at common law. See *Semayne's Case*, 77 Eng. Rep. 194, 198 (K.B. 1603) (the privilege of the house "shall not extend to protect any person who flies to his house . . . to escape the ordinary process of law . . ."); *Allen v. Martin*, 10 Wend. 300, 304 (N.Y. Sup. Ct. 1833).

⁹⁶ *Payne v. United States*, 508 F.2d 1391, 1394 (5th Cir.) (owner not home), *cert. denied*, 423 U.S. 933 (1975); *State v. Iverson*, 364 N.W.2d 518, 526 (S.D. 1985) ("The demand for admittance and the notice of authority and purpose required by the statute presupposes the presence of a human being in the premises.").

⁹⁷ 357 U.S. 301 (1958). See, e.g., *United States v. Kulcsar*, 586 F.2d 1283, 1286 (8th Cir. 1978); *United States v. Seelig*, 498 F.2d 109, 113-14 (5th Cir. 1974); *Hair v. United States*, 289 F.2d 894, 896 (D.C. Cir. 1961); *State v. Hatcher*, 322 N.W.2d 210, 218 (Minn. 1982).

⁹⁸ *Miller*, 357 U.S. at 310. See *infra* notes 109-30 and accompanying text.

⁹⁹ E.g., *United States v. Guyon*, 717 F.2d 1536, 1538-39 (6th Cir. 1983), *cert. denied*, 465 U.S. 1067 (1984).

¹⁰⁰ E.g., *United States v. Singleton*, 439 F.2d 381, 386 (3rd Cir. 1971).

¹⁰¹ See *United States v. James*, 764 F.2d 885, 888 (D.C. Cir. 1985). See also *Singleton*, 439 F.2d at 386. Suspicious noises inside a dwelling are relevant to the other exceptions, particularly the destruction of evidence exception.

¹⁰² See generally *Garcia*, *supra* note 84; *Goddard*, *supra* note 83.

warrant.”¹⁰³ As a result of the controversy caused by the application of this exception in drug searches,¹⁰⁴ courts have strongly disagreed on the requisite showing of risk required to trigger this exception.¹⁰⁵ Some courts have required proof that officers were aware of specific facts at the scene that implied the destruction of evidence.¹⁰⁶ A small minority of courts have held that exigency can be shown based solely on the type of evidence sought under the warrant.¹⁰⁷ Thus, some courts have held that when a house has “normal plumbing facilities” and officers are looking for small quantities of drugs, police may presume exigent circumstances exist which will obviate the necessity of complying with the knock-and-announce rule.¹⁰⁸

E. THE SUPREME COURT AND THE KNOCK-AND-ANNOUNCE RULE

The Supreme Court first considered the knock-and-announce issue in *Miller v. United States*.¹⁰⁹ In that case, officers¹¹⁰ without a warrant arrived at William “Blue” Miller’s door, intending to arrest him.¹¹¹ The police knocked at the door and a voice from within replied, “who’s there?”¹¹² In a low voice, the officers responded, “police.”¹¹³ Miller opened the chained door and asked the police what they were doing there, but before the police could respond, he tried

¹⁰³ MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 220.3(3) (1975).

¹⁰⁴ See Garcia, *supra* note 84, at 698.

¹⁰⁵ Commonwealth v. Scalise, 439 N.E.2d 818, 822 (Mass. 1982); 2 LaFAVE, *supra* note 39, § 4.8(d). For a complete breakdown of the standards preferred by state and federal courts, see Garcia, *supra* note 84, at 698-99.

¹⁰⁶ E.g., United States v. Shugart, 889 F. Supp. 963, 976-77 (E.D. Tex. 1995) (rejecting the use of the “inevitable discovery” exception to the exclusionary rule in knock-and-announce cases); State v. Bamber, 630 So. 2d 1048 (Fla. 1994).

¹⁰⁷ E.g., United States v. One Parcel of Real Property, 873 F.2d 7, 9 (1st Cir.), *cert. denied*, 493 U.S. 891 (1989) (drugs); People v. DeLago, 213 N.E.2d 659, 661 (N.Y. 1965), *cert. denied*, 383 U.S. 963 (1966) (gambling “flash paper”).

¹⁰⁸ E.g., State v. Stevens, 511 N.W.2d 591 (1994), *cert. denied*, 115 S. Ct. 2245 (1995); United States v. Moore, 956 F.2d 843, 849-50 (8th Cir. 1992). The logic is that many drug offenders attempt to flush their drugs down the toilet when they realize the police are about to raid their home, so having plumbing in a house creates a risk of destruction of evidence.

¹⁰⁹ 357 U.S. 301 (1958).

¹¹⁰ Six officers were involved in the investigation that led the police to Miller’s house. The officers included two from the District of Columbia Metropolitan Police Department, two from the Federal Bureau of Narcotics, and two Virginia State Police officers. One D.C. officer and one Federal agent went to the door to make the arrest. *Id.* at 303 n.1.

¹¹¹ *Id.* at 303. The officers were looking for \$100 in marked money that had been used by an informant to buy heroin from Arthur Shepherd, the brother of Miller’s roommate Bessie Byrd. The police had observed Shepherd enter Miller’s basement apartment with the money, but when Shepherd was arrested in a taxicab minutes after leaving the apartment, he did not have the money. He had 100 capsules of heroin instead. *Id.* at 302-03.

¹¹² *Id.* at 303.

¹¹³ *Id.*

to shut the door.¹¹⁴ The officers broke the door chain and entered the apartment.¹¹⁵

Miller argued that his Fourth Amendment rights were violated when the police entered without announcing their purpose.¹¹⁶ However, the Supreme Court did not reach the constitutional issue. The Court declared the arrest illegal, and suppressed the evidence found during the search.¹¹⁷ They based their decision on the law of the District of Columbia,¹¹⁸ which set up criteria to judge arrests "identical with those embodied in 18 U.S.C. § 3109."¹¹⁹

Justice Brennan, writing for the Court, explained that the knock-and-announce rule is "deeply rooted in our heritage and should not be given grudging application."¹²⁰ Justice Brennan suggested that § 3109 was a codification of the common law by Congress.¹²¹ The Court then fashioned a very broad notice requirement under § 3109 from the unrestricted announcement requirement found in *Semayne's Case*.¹²² Under the Court's rule, officers must expressly announce their purpose before breaking open a door.¹²³

Justice Brennan identified two purposes for the rule: the "reverence of the law for the individual's right of privacy in his house"¹²⁴ and the safety of police.¹²⁵ Justice Brennan noted that some state cases had carved out exceptions to the knock-and-announce rule,¹²⁶ but reserved the question of whether exigent circumstances justified noncompliance with § 3109.¹²⁷ However, Justice Brennan did expressly acknowledge that an exception occurs when officers are "virtually certain" that a suspect already knows their purpose.¹²⁸ In that case, he noted, announcement would be a "useless gesture" and would

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 303-04. Miller and Byrd were both arrested after the officers entered the apartment. The officers found the marked \$100 in their ensuing search. *Id.* at 304.

¹¹⁶ Blakey, *supra* note 57, at 517.

¹¹⁷ *Miller*, 357 U.S. at 313-14.

¹¹⁸ *Miller*, 357 U.S. at 306, 311 (citing *Accarino v. United States*, 179 F.2d 456 (D.C. Cir. 1949)).

¹¹⁹ *Id.* at 306.

¹²⁰ *Id.* at 313.

¹²¹ *Id.*

¹²² *Id.* at 308-09.

¹²³ *Id.* at 309.

¹²⁴ *Id.* at 313.

¹²⁵ *Id.* at 313 n.12 (citing *McDonald v. United States*, 335 U.S. 451, 460-61 (Harlan, J., concurring)).

¹²⁶ *Id.* at 309 (citing *People v. Maddox*, 294 P.2d 6 (Cal.), *cert. denied*, 352 U.S. 858 (1956) (destruction of evidence); *Read v. Case*, 4 Conn. 166 (1822) (apprehension of peril)).

¹²⁷ *Miller*, 357 U.S. at 309.

¹²⁸ *Id.* at 310.

not be required.¹²⁹ Applying that standard, the Court found that the officers were not "virtually certain" that Miller knew their purpose.¹³⁰

The Court stepped back from the *Miller* "virtually certain" standard in *Ker v. California*.¹³¹ In *Ker*, the police used a pass key to enter Ker's apartment without knocking or announcing their identity or purpose until inside.¹³² Although a 5-4 majority affirmed a lower court ruling allowing materials gained in the search of Ker's apartment into evidence,¹³³ the *Ker* Court split 4-4 on the question of whether the entry was reasonable under the Fourth Amendment.¹³⁴

The plurality opinion, written by Justice Clark, held that the entry was reasonable by Fourth Amendment standards.¹³⁵ Justice Clark evaluated the lawfulness of the arrest under California law.¹³⁶ The California courts recognized an exception to the knock-and-announce rule for cases in which officers "in good faith" believe that evidence

¹²⁹ *Id.*

¹³⁰ *Id.* at 310-13. The Court held that Miller's attempt to close the door was an ambiguous act, in light of the time of the entry, the fact that the police were not in uniform, and the fact that his query of the officers' purpose went unanswered.

¹³¹ 374 U.S. 23 (1963). Between *Miller* and *Ker*, the Court addressed the knock-and-announce issue briefly in *Wong Sun v. United States*, 371 U.S. 471 (1963). The primary issue in *Wong Sun* was whether statements gathered during a warrantless arrest conducted without probable cause were admissible evidence. The government argued that the suspect's conduct at the door when the police called gave the police probable cause to enter. An officer knocked at the door of the suspect's laundromat (which also contained his residence) two hours before the laundromat opened for business, and claimed to be a customer. When the ruse failed, the officer identified himself as a narcotics officer, but did not identify his purpose. The suspect slammed the door shut and ran away down the hall. The officers broke open the door. *Id.* at 473-74. Justice Brennan, again writing for the Court, held that the suspect's flight was ambiguous conduct, for "innocent people caught in a web of circumstances frequently become terror-stricken." *Id.* at 483 n.10 (quoting *Cooper v. United States*, 218 F.2d 39, 41 (1953)).

¹³² *Ker*, 374 U.S. at 28. The police did not have a warrant.

¹³³ *Id.* at 24-25.

¹³⁴ *Ker* has more precedential value as the culmination of the process of incorporating the Fourth Amendment into the Fourteenth Amendment that began in *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), and continued in *Mapp v. Ohio*, 367 U.S. 643 (1961). *Ker* changed the standard by which state searches were judged from the "flexible concept of 'fundamental fairness,'" under the Due Process Clause of the Fourteenth Amendment, to the same standard of reasonableness by which federal searches are judged. *Ker*, 374 U.S. at 33, 44-45 (Harlan, J., concurring). On this holding, the court voted 8-1, with only Justice Harlan dissenting. Harlan did not believe the Fourth Amendment was applicable in this case, and never reached the issue of whether the search was reasonable under the Fourth Amendment. Thus, the Court split 4-4 on the issue of reasonableness.

¹³⁵ *Ker*, 374 U.S. at 41.

¹³⁶ CAL. PENAL CODE § 844 (West Supp. 1995) governs the execution of arrests in California:

To make an arrest, . . . in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which . . . [he has] reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired.

would be destroyed if they knocked and announced their purpose.¹³⁷ Evaluating the facts of the case under this standard, the plurality concluded that the arrest did not violate the Fourth Amendment.¹³⁸ However, the plurality made no attempt to probe the scope of exigent circumstances which could justify a lack of announcement.

Justice Brennan¹³⁹ dissented from the part of the plurality opinion upholding the search under the Fourth Amendment.¹⁴⁰ Brennan felt that all unannounced entries violate the Fourth Amendment unless they fit into three sharply limited exceptions to the announcement rule:

(1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within . . . are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.¹⁴¹

Moreover, Justice Brennan sharply criticized a blanket exception allowing unannounced police entries into homes based on past police experience that "other narcotics suspects had responded to police announcements by attempting to destroy evidence," since that would create an "exception that [would] devour the rule."¹⁴² Brennan believed that allowing an exception in the absence of an objective indication that the occupants of the home were aware of the police presence would violate the presumption of innocence, since the entry would have to be justified on the assumption that the occupants would resist or further violate the law upon announcement.¹⁴³

The Court held an unannounced entry through an unlocked door illegal in *Sabbath v. United States*.¹⁴⁴ In *Sabbath*, the Court considered the level of force required to qualify as a breaking under 18

¹³⁷ *People v. Maddox*, 294 P.2d 6, 9 (Cal.), *cert. denied*, 352 U.S. 858 (1956). Justice Traynor justified the exception by reasoning that since § 844 is a codification of the common law, it should be interpreted in light of the common law exceptions for apprehension of peril and destruction of evidence. *Id.*

¹³⁸ Justification for the unannounced entry was found because of the officers' belief that Ker had narcotics which were easily destroyed, and the officers' past experience that narcotics suspects often tried to destroy evidence when police announced their presence. In addition, "Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police." *Ker*, 374 U.S. at 40. The "furtive conduct" was a U-turn in the middle of a block while police were secretly following his car home. *Id.* at 27. However, there was no indication that Ker was aware that the police were following him at that point. *Id.* at 60-61 (opinion of Brennan, J.).

¹³⁹ Justice Brennan's opinion was joined by Chief Justice Warren, Justice Douglas, and Justice Goldberg. *Id.* at 46.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 47.

¹⁴² *Id.* at 61.

¹⁴³ *Id.* at 56.

¹⁴⁴ 391 U.S. 585 (1968).

U.S.C. § 3109.¹⁴⁵ Police knocked at Sabbath's door after sending an informant in to deliver drugs to him.¹⁴⁶ Receiving no response, the officers opened Sabbath's unlocked door and entered with their guns drawn.¹⁴⁷ The Court concluded that the officers' entry was no less intrusive than a violent entry.¹⁴⁸

In the aftermath of *Ker* and *Sabbath*, commentators believed that the court had constitutionalized the knock-and-announce rule.¹⁴⁹ However, courts split as to whether the knock-and-announce rule was constitutionally mandated.¹⁵⁰ The Supreme Court denied certiorari on this issue until *Wilson v. Arkansas*.¹⁵¹

III. FACTS AND PROCEDURAL HISTORY

Sharlene Wilson lived at 534 Oaklawn Street in Malvern, Arkansas, with her fiancée, Bryson Jacobs.¹⁵² In late 1992, the Arkansas State Police's Seventh Judicial District Drug Taskforce received information of suspicious activity at the house. Consequently, its occupants were targeted for investigation.¹⁵³

The police sent an informant to buy drugs from Wilson, who was

¹⁴⁵ *Id.* at 587-88.

¹⁴⁶ *Id.* at 587.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 590. The Court relied on *People v. Rosales*, 437 P.2d 489 (Cal. 1968) (en banc), which held that an unannounced entry by the police through a closed and unlocked door was illegal under CAL. PENAL CODE § 844 (West Supp. 1995). The *Sabbath* Court also looked at common law sources for definitions of "break" in burglary, and quoted with approval Horace L. Wilgus, *Arrest Without A Warrant*, 22 MICH. L. REV. 798, 806 (1922): "What constitutes breaking seems to be the same as in burglary: lifting a latch, turning a door knob, unhooking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house—even a closed screen door . . . is a breaking" *Sabbath*, 391 U.S. at 590 n.5.

¹⁴⁹ *E.g.*, Garcia, *supra* note 84, at 693-94 (1993); Michael R. Sonnenrich & Stanley Ebner, *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 ST. JOHN'S L. REV. 626, 643 (1970); Blakey, *supra* note 57, at 551 (1964).

¹⁵⁰ *E.g.*, *United States v. Bustamante-Gamez*, 488 F.2d 4, 9 (9th. Cir. 1973) (yes, citing *Ker*); *State v. Dusch*, 289 N.E.2d 515, 516-17 (Ind. 1972) (yes, citing *Ker* and *Sabbath*); *State v. Valentine*, 504 P.2d 84, 85 (Or. 1972) (en banc) (yes, citing *Ker*), *cert. denied*, 412 U.S. 948 (1973); *Commonwealth v. Newman*, 240 A.2d 795, 799 (Pa. 1968) (same). *But see, e.g.*, *State v. Hider*, 649 A.2d 14, 15 (Me. 1994) (no knock-and-announce requirement); *State v. Tyler*, 840 P.2d 413, 427 (Kan. 1992) (same); *Commonwealth v. Goggin*, 587 N.E.2d 785, 787 (Mass. 1992) (knock-and-announce requirement based on the common law). The Supreme Court contributed to the confusion by referring in *Sabbath* to "exceptions to any possible constitutional rule relating to announcement and entry." *Sabbath*, 391 U.S. at 591 n.8 (italics added).

¹⁵¹ *Compare* *Commonwealth v. Cundriff*, 415 N.E.2d 172 (Mass. 1980) (not constitutionally required), *cert. denied*, 451 U.S. 973 (1981) *with* *People v. Polidori*, 476 N.W.2d 482 (Mich. App. 1991) (constitutionally required), *app. denied*, 479 N.W.2d 636 (Mich.), *cert. denied*, 113 S. Ct. 298 (1992).

¹⁵² Brief for Petitioner at 20, *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995) (No. 94-5707).

¹⁵³ *Id.*

herself a former Drug Enforcement Administration informant.¹⁵⁴ On November 22, 1992, the informant, wired with a body microphone, went to the house and purchased marijuana from Jacobs.¹⁵⁵ The police recorded their conversations and the transaction.¹⁵⁶ On the next day, the informant was wired again and sent to the house to buy methamphetamine.¹⁵⁷ The informant was successful, and the second transaction was also captured on tape.¹⁵⁸

One month later, on December 30, 1992, the informant arranged to purchase drugs from Wilson at a local convenience store.¹⁵⁹ This time, however, the informant was not wired with any listening devices.¹⁶⁰ The informant went to the convenience store, where the police set up surveillance and waited for Wilson to arrive.¹⁶¹ When Wilson arrived, the informant climbed in Wilson's pickup truck.¹⁶² The informant testified that before the sale, Wilson asked her if she was working for the police.¹⁶³ The informant told Wilson she was not.¹⁶⁴ At trial, the informant claimed that Wilson threatened to kill her if she was working for the police.¹⁶⁵ Wilson also allegedly made her lift her shirt to check for listening devices.¹⁶⁶ Satisfied that the police were not involved, Wilson sold the informant marijuana.¹⁶⁷ However, Wilson did not have change for the informant, so the two drove to another store to make change.¹⁶⁸ On the way, Wilson brandished a semi-automatic pistol and again threatened to kill the informant if she was working for the police.¹⁶⁹ After returning to the first store, the informant met the police and told them about the threat.¹⁷⁰

The next day, the police officers applied for and obtained a warrant to search Wilson's home and to arrest both Wilson and Jacobs.¹⁷¹ The affidavits filed with the search warrant detailed the transactions

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 21.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Wilson v. Arkansas*, 115 S. Ct. 1914, 1915 (1995).

¹⁶⁰ Brief for Petitioner at 22, *Wilson* (No. 94-5707).

¹⁶¹ *Id.* at 21-22.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Wilson v. Arkansas*, 115 S. Ct. 1914, 1915 (1995).

and indicated that Jacobs had been previously convicted of arson and firebombing.¹⁷²

The officers executed the search warrant later that afternoon.¹⁷³ When the officers arrived at Wilson's house, they found the main door open, and could see Jacobs through the screen door.¹⁷⁴ As they opened the unlocked screen door and entered the home, the officers identified themselves and announced that they had a warrant.¹⁷⁵ The police did not have their weapons drawn as they entered the house.¹⁷⁶ Once inside the house, the police found marijuana, methamphetamine, valium, drug paraphernalia, the handgun allegedly used to threaten the informant, and ammunition.¹⁷⁷ The police also found Wilson in the bathroom flushing marijuana down the toilet.¹⁷⁸ Wilson and Jacobs were arrested and charged with delivery of a controlled substance, possession of a controlled substance with intent to deliver, and possession of drug paraphernalia.¹⁷⁹ Wilson was also charged with "terroristic threatening" for her threats against the informant.¹⁸⁰ Wilson and Jacobs were tried separately.¹⁸¹

Before trial, Wilson moved to suppress the evidence seized during the search.¹⁸² Wilson claimed the search was invalid because the police officers failed to knock and announce their purpose before entering.¹⁸³ The trial court summarily denied the motion to suppress.¹⁸⁴ A jury convicted Wilson on all charges, sentenced her to 32 years in prison¹⁸⁵ and fined her \$11,000.¹⁸⁶

Wilson appealed her conviction to the Arkansas Supreme Court.¹⁸⁷ She argued that the evidence gathered in the search should have been suppressed because the Fourth Amendment requires officers to knock and announce their purpose prior to entering a residence.¹⁸⁸ The court found "no authority" for Wilson's theory, and

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*; Brief for Petitioner at 24, *Wilson* (No. 94-5707).

¹⁷⁵ *Wilson*, 115 S. Ct. at 1915.

¹⁷⁶ Brief for Petitioner at 18, *Wilson* (No. 94-5707).

¹⁷⁷ *Wilson*, 115 S. Ct. at 1916.

¹⁷⁸ *Id.*

¹⁷⁹ Brief for Respondent at 3-4, *Wilson*, 115 S. Ct. 1914 (1995) (No. 94-5707).

¹⁸⁰ *Id.*

¹⁸¹ Brief for Petitioner at 26, *Wilson* (No. 94-5707).

¹⁸² *Wilson*, 115 S. Ct. at 1916.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Brief for Respondent at 4, *Wilson* (No. 94-5707).

¹⁸⁷ *Wilson v. State*, 878 S.W.2d 755 (Ark. 1994).

¹⁸⁸ *Id.* at 758.

held that neither the Fourth Amendment, nor Arkansas law¹⁸⁹ required officers to knock and announce before forcibly entering a dwelling.¹⁹⁰ Therefore, the Arkansas Supreme Court, concluding that suppression of the evidence was unwarranted, affirmed the conviction.¹⁹¹ The United States Supreme Court granted certiorari to determine whether "the common-law 'knock-and-announce' principle forms a part of the Fourth Amendment reasonableness inquiry."¹⁹²

IV. SUMMARY OF THE COURT'S OPINION

Writing for a unanimous court, Justice Thomas reversed the decision of the Arkansas Supreme Court and remanded the case for further proceedings, holding that the knock-and-announce rule is a factor in determining whether a search is reasonable under the Fourth Amendment.¹⁹³ Justice Thomas began by noting that the Court has looked at traditional protections against unreasonable searches and seizures at the time of the Constitution's framing to determine the scope of the Fourth Amendment's protection against unreasonable searches.¹⁹⁴

Justice Thomas then traced the history of the knock-and-announce rule, noting that the early English common law courts recognized the knock-and-announce principle.¹⁹⁵ Thomas examined several seventeenth and eighteenth-century English cases, particularly *Semayne's Case*,¹⁹⁶ and found that the general rule in early common-law courts was that "when the King is party, the sheriff (if the doors be not open) may break the party's house . . . to do . . . execution of the

¹⁸⁹ ARK. R. CRIM. PROC. 13.3(e) governs search warrant execution: "The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety."

¹⁹⁰ *Id.*

¹⁹¹ *Wilson v. Arkansas*, 115 S. Ct. 1914, 1916 (1995).

¹⁹² *Id.*

¹⁹³ *Id.* at 1915.

¹⁹⁴ *Id.* at 1917. Thomas provides three examples to support this proposition. *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (analysis of the common law definitions of "seizure" and "arrest" used to determine that a fleeing suspect has not been arrested until caught by an officer); *United States v. Watson*, 423 U.S. 411, 418-420 (1976) (using common law right of an officer to arrest without a warrant in holding that a warrantless arrest by a postal inspector who has reason to believe that the arrestee has committed a felony is reasonable); *Carroll v. United States*, 267 U.S. 132 (1925) ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.").

¹⁹⁵ *Wilson*, 115 S. Ct. at 1916-17.

¹⁹⁶ 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603).

K[ing]'s process, if otherwise he cannot enter."¹⁹⁷ However, the common law courts qualified this rule, requiring that before the sheriff could break down the door, "he ought to signify the cause of his coming, and to make request to open doors . . . , for the law without a default in the owner abhors the destruction or breaking of any house. . . ."¹⁹⁸ The Court also cited several prominent eighteenth-century commentators, including William Blackstone and Sir Matthew Hale, to show that at the time the Constitution was framed, there was general agreement in England on the importance of the knock-and-announce principle.¹⁹⁹

The Court went on to show that the knock-and-announce rule was carried over to American law from the common law.²⁰⁰ Furthermore, the Court noted that some states even passed statutes specifically adopting the common law view "that the breaking of the door of a dwelling was permitted once admittance was refused."²⁰¹ Thomas concluded his historical analysis by showing that nineteenth-century American courts also embraced the common law principle,²⁰² and that prior Supreme Court cases acknowledged that the common law "principle of announcement is 'embedded in Anglo-American law.'"²⁰³ In light of the "longstanding common law endorsement of the practice of announcement," the Court concluded that the "Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a seizure."²⁰⁴ Therefore, the Court held that "in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment."²⁰⁵

However, the Court did not address the circumstances that would make an unannounced entry unreasonable by Fourth Amendment standards. Instead, the Court expressly left that matter to the lower courts.²⁰⁶ The Court did, however, emphasize that the "Fourth Amendment's flexible requirement of reasonableness" does not mandate that officers must knock and announce before every search.²⁰⁷ The Court observed that at common law, at the time of the framing,

¹⁹⁷ *Wilson*, 115 S. Ct. at 1916 (quoting *Semayne's Case*, 77 Eng. Rep. at 195).

¹⁹⁸ *Id.* (quoting *Semayne's Case*, 77 Eng. Rep. at 195).

¹⁹⁹ *Id.* at 1917.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 1918 (quoting *Miller v. United States*, 357 U.S. 301, 313 (1958)).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1919.

²⁰⁷ *Id.* at 1918.

the announcement rule had not been conclusively extended to felony cases, though the rule eventually expanded to cover felony arrests.²⁰⁸ The Court continued with a battery of nineteenth-century cases dealing with common law exceptions to the knock-and-announce requirement.²⁰⁹ Justice Thomas concluded that although an unannounced search may be unconstitutional, countervailing law enforcement interests can establish that an unannounced entry may be reasonable.²¹⁰

The Court refused to consider the State's argument that the officers had a reasonable fear for their safety and that prior announcement would create an unreasonable risk that the petitioner would destroy evidence.²¹¹ Justice Thomas noted that the Arkansas Supreme Court had not ruled on the sufficiency of these issues, and left the issue for the state court to decide on remand. The Court did indicate, however, that "these concerns may well provide the necessary justification for the unannounced entry in this case."²¹² The Court also refused to consider the State's argument that the exclusion of evidence from searches made unreasonable by an unannounced entry is not constitutionally required, because that issue had not been adjudicated by the Arkansas courts and was outside of the limited issue on which the Court granted certiorari.²¹³

V. ANALYSIS

In *Wilson v. Arkansas*, the Court correctly reversed the Arkansas Supreme Court's ruling. However, the Court's relegation of the knock-and-announce requirement to a "factor" in the reasonableness inquiry undervalues the interests served by the knock-and-announce rule. The Court came to its determination by looking only at the common law history of the rule and its exceptions. Although a historical analysis is useful to a determination of Fourth Amendment reasonableness, an inquiry which looks only at history is inherently incomplete, and potentially ignores countervailing modern interests. By closely examining the history of the knock-and-announce rule, and balancing the interests involved, this Note concludes that unannounced entries should be presumptively unreasonable. Unannounced entries should only be allowed when a "reasonably prudent

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 1918-19. The exceptions listed included situations when announcement would place police in danger of physical violence, and where police have a reasonable suspicion that evidence will be destroyed if the police give advance notice of their presence.

²¹⁰ *Id.* at 1919.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

officer would be warranted in the belief, based on specific and articulable facts, and not on a mere inchoate and unparticularized suspicion or 'hunch,'"²¹⁴ that exigent circumstances exist at the site of the search.

A. THE COURT INCORRECTLY APPLIED THE REASONABLENESS INQUIRY

1. *Reasonableness Cannot be Determined Solely by Historical Analysis*

The Court's sole reliance upon the common law distorted the test of reasonableness used to determine the scope of the Fourth Amendment's protection against unreasonable searches. While the common law may "be instructive"²¹⁵ about or "[shed] light"²¹⁶ on the meaning of the Fourth Amendment, history is only one element out of several the Court has used to determine the reasonableness of a search.²¹⁷ Justice Thomas's method of analysis was described in two key sentences in his opinion:

In evaluating the scope of [the Unreasonable Search Clause], we have looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment.²¹⁸

Justice Thomas gives no authority for the second statement. He supports the first statement with citations to three cases: *California v. Hodari D.*,²¹⁹ *United States v. Watson*,²²⁰ and *Carroll v. United States*.²²¹ However, an examination of the three cases shows that in each case the historical analysis was only a part of a larger overall analysis.

Hodari D. did not address the scope of "unreasonable" searches or seizures at all. Rather, it addressed the definition of "seizure" as it is used in the Fourth Amendment.²²² The *Hodari D.* Court discussed the

²¹⁴ *Maryland v. Buie*, 494 U.S. 325, 332 (1990) (citations and quotation marks omitted).

²¹⁵ *Steagald v. United States*, 451 U.S. 204, 217 (1981).

²¹⁶ *Payton v. New York*, 445 U.S. 573, 591 (1980).

²¹⁷ The other factors are recounted in the text accompanying notes 35-38, *supra*.

²¹⁸ *Wilson v. Arkansas*, 115 S.Ct. 1914, 1916 (1995) (citations and quotation marks omitted).

²¹⁹ 499 U.S. 621 (1991).

²²⁰ 423 U.S. 411 (1976).

²²¹ 267 U.S. 132 (1925).

²²² In *Hodari D.*, a police officer chased a teen who ran when he saw the policeman's car approach. While being pursued, the teen threw away what later turned out to be a piece of crack cocaine. The government admitted that the arrest was unlawful and the only issue before the Court was whether *Hodari* had been "seized" for Fourth Amendment purposes at the time he threw away the cocaine. The Court held that the Fourth Amendment was not implicated because *Hodari* had not been seized at the time he abandoned the cocaine. *Hodari D.*, 499 U.S. at 622-23, 626.

common law definition of "arrest," but also considered and rejected an expansion of the meaning of "seizure" on policy grounds.²²³ The fundamental problem with *Hodari's* claim was not that the common law would not regard a chase as an arrest, but rather that the common usage of the word "seizure" did not "remotely apply" to the facts of the case.²²⁴ Thus, the historical definition of "arrest" was not the sole basis for the Court's decision.

Watson, the second case relied upon by the Court, involved the admissibility of evidence seized after a warrantless arrest by a postal inspector who admittedly had time to secure a warrant.²²⁵ Here, the Court consulted the common law to show that arrest without a warrant was permissible under the Constitution. However, the Court's finding was heavily influenced by the fact that Congress had given postal inspectors the authority to make warrantless arrests.²²⁶ The Court was also swayed by the knowledge that nearly all states allowed warrantless arrests for felonies by statute.²²⁷ Though the Court did not engage in balancing to determine reasonableness in *Watson*, its decision was based as much, if not more, on current state and federal government statutory law than on the common law arrest power.²²⁸ Thus, the Court's method of analysis in *Watson* is markedly different from the Court's method of analysis in *Wilson*, and cannot support a reasonableness determination based entirely on historical analysis.

Carroll, a prohibition-era case relied upon by the Court, involved the admissibility of alcohol seized during a warrantless search of an automobile.²²⁹ The Court in *Carroll* held that a warrantless search of an automobile was not unreasonable.²³⁰ *Carroll* was a case of first impression, so the Court attempted to determine what "unreasonable search" meant to the Framers of the Fourth Amendment.²³¹ The Court, however, also looked to its own analogous precedent and offered a practical argument against using warrants in automobile

²²³ *Id.* at 624-27. Cf. Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. ILL. L. REV. 729, 754-6 (listing and criticizing the propositions made in the majority opinion in *Hodari D.*).

²²⁴ *Hodari D.*, 499 U.S. at 626.

²²⁵ *United States v. Watson*, 423 U.S. 411, 413-14 (1976).

²²⁶ *Id.* at 415-416. "[T]here is a strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,' [o]bviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional." *Id.* (quoting *United States v. Di Re*, 332 U.S. 581, 585 (1948)).

²²⁷ *Id.* at 421-22.

²²⁸ See *id.* at 422-423.

²²⁹ 267 U.S. 132 (1925).

²³⁰ *Id.* at 149.

²³¹ *Id.* at 149-153.

searches: an automobile can be moved out of a jurisdiction in the time required to secure a warrant.²³²

Both Justices Scalia²³³ and Thomas²³⁴ have cited *Carroll* for the proposition that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted. . . ."²³⁵ Both Justices use *Carroll* to justify an analysis which regards the meaning of "unreasonable search" in 1791 as dispositive of the definition of the phrase "unreasonable searches" in the Fourth Amendment.²³⁶ However, the full quote of *Carroll's* endorsement of historical analysis rejects the use of history as the sole source of determining reasonableness: "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted *and in a manner which will conserve public interests as well as the interests and rights of individual citizens.*"²³⁷ Thus, none of the cases Justice Thomas cites to support his purely historical analysis of the knock-and-announce requirement validate the use of history as the sole guide to determine Fourth Amendment reasonableness.

2. The Garner Problem

The key problem with using a purely historical analysis of the Fourth Amendment is that society and law enforcement have changed substantially since 1791.²³⁸ Due to these dramatic changes, reliance on common law rules can produce "a mistaken literalism that ignores the purposes of a historical inquiry."²³⁹ *Tennessee v. Garner* illustrates

²³² *Id.* at 147, 153.

²³³ *Minnesota v. Dickerson*, 113 S. Ct. 2130, 2139 (1993) (Scalia, J., concurring).

²³⁴ *Wilson v. Arkansas*, 115 S. Ct. 1914, 1916 (1995).

²³⁵ *Carroll*, 267 U.S. at 149.

²³⁶ *E.g., Dickerson*, 113 S. Ct. at 2139 (Scalia, J., concurring).

²³⁷ *Carroll*, 267 U.S. at 149 (emphasis added).

²³⁸ For example, uniformed police departments were not organized until 1845. Donald B. Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant is an Idea Whose Time Has Come*, 64 NOTRE DAME L. REV. 552 n.1 (1989). Also, criminals were not armed with AK-47s in 1791; weaponry was far less powerful and accurate in 1791. *Tennessee v. Garner*, 471 U.S. 1, 14-15 (1985).

²³⁹ *Garner*, 471 U.S. at 13. The Court has cautioned against unthinking application of common law principles to determine the meaning of the Fourth Amendment. *E.g., Steagald v. United States*, 451 U.S. 204, 217 n.10 (1981) ("Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper."); *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980) ("[T]his Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage.").

Moreover, the Fourth Circuit, in one of the first cases citing *Wilson*, also warned against rigidly conforming the Fourth Amendment to practices of the time of the Framers. *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995).

that the Court will consider societal changes to determine the meaning of "unreasonable search."

Garner involved the constitutionality of a statute which allowed police to use deadly force to effect an arrest.²⁴⁰ A Tennessee police officer shot and killed Garner as he fled the scene of a burglary, although the officer believed Garner was unarmed.²⁴¹ The Court rejected the argument the clear common law rule allowing officers to kill all fleeing felons was dispositive on the reasonableness question.²⁴² Changes in the types of crimes that are considered felonies, the manner in which felonies are punished, and the types of weaponry available convinced the Court that following the common law rule would not serve Fourth Amendment purposes.²⁴³ Therefore, the Court balanced the "unmatched" intrusion of deadly force against the state's necessity to use the force, and determined that the use of deadly force against fleeing felons is allowable only in certain circumstances.²⁴⁴

Wilson's historical analysis presents some of the same concerns found in *Garner*. For example, the increased sophistication of weaponry noted by the *Garner* court also has implications for the execution of search warrants.²⁴⁵ Officers at common law did not have to serve warrants on suspects armed with automatic weapons. Many people, particularly in the law enforcement community, argue that the knock-and-announce rule is an anachronism in light of current dangers.²⁴⁶ In the face of such criticism, a purely historical analysis is a weak basis of decision. If the *Wilson* Court was interested in maintaining the protection of the interests served by the knock-and-announce rule, it should have demonstrated that the interests served by the rule still apply in 1995. This type of inquiry requires balancing, rather than

²⁴⁰ *Garner*, 471 U.S. at 5-7.

²⁴¹ *Id.* at 3-4.

²⁴² *Id.* at 13.

²⁴³ *Id.* at 13-15. The Court concluded, "[t]hough the common-law pedigree of Tennessee's rule is pure on its face, changes in the legal and technological context mean the rule is distorted almost beyond recognition when literally applied." *Id.* at 15.

²⁴⁴ *Id.* at 7-12. The Court also looked to the prevailing trends in relevant state statutes, as well as local police department policies to determine that the rule was not necessary for effective law enforcement. *Id.* at 15-20.

²⁴⁵ Some criminals are armed with military style assault rifles and other automatic weapons. See Allegro, *supra* note 238, at 560.

²⁴⁶ For example, one commentator writes:

One of the most troublesome requirements regarding [search warrant] execution is that which requires that notice be given prior to forcible entry. . . . officers recognize what the courts call the [anachronism] of the notice rule in an era when the suspect often has the opportunity to injure the officer or to efficiently dispose of evidence.

JOHN C. KLOTTER, LEGAL GUIDE FOR POLICE: CONSTITUTIONAL ISSUES (3d ed. 1992). Cf. Allegro, *supra* note 238, at 562-68.

merely referencing, the interests involved.

B. THE BALANCING OF INTERESTS FAVORS A STRONGER RULE

The interests protected by the knock-and-announce rule continue to be relevant today. Unannounced raids by police invade the personal security interest protected by the Fourth Amendment and are extremely dangerous to both police and those inside the home.²⁴⁷ The danger to the police comes from several factors. An unannounced entry by officers is a terrifying act to the person being targeted. Moreover, no-knock raids are often conducted by plainclothes officers, increasing the chance that a panicked homeowner will think that the invaders are criminals.²⁴⁸ Guns are present in nearly half of all American homes,²⁴⁹ and nearly all states give homeowners the authority to use deadly force to protect themselves and their homes.²⁵⁰ Frightened homeowners with guns may pose a significant threat to the safety of police (especially plainclothes police) serving a warrant.²⁵¹

Innocent citizens are also victims of no-knock raids. Mistaken

²⁴⁷ See *Ker v. California*, 374 U.S. 23, 52-53 (Brennan, J., concurring and dissenting).

²⁴⁸ See JAMES BOVARD, *LOST RIGHTS* 234-37 (1994).

²⁴⁹ BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS* 1993 203, table 2.5 (1994) (49% of Americans nationwide report having a gun at home).

²⁵⁰ 43 states allow the use of deadly force to protect a dwelling. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *REPORT TO THE NATION ON CRIME AND JUSTICE* 31 (2d ed. 1988) (table with state by state listing of deadly force privilege status). For example, Texas allows a person to use deadly force to protect land when "when and to the degree he reasonably believes the deadly force is immediately necessary to prevent the other's imminent commission of . . . burglary . . ." TEX. PENAL CODE ANN. § 9.42(2)(A) (West 1994). A homeowner can rely on this section to defend against a murder of an officer forcibly entering his house to serve a warrant. See *Venegas v. State*, 660 S.W.2d 547 (Tex. Ct. App. 1983).

Similarly, Illinois allows the use of deadly force to protect a dwelling when "[t]he entry is made or attempted in a violent, riotous, or tumultuous manner, and he reasonably believes that such force is necessary to prevent an assault upon, or offer of personal violence to, him or another then in the dwelling. . . ." 720 ILCS § 5/7-2 (1994). Thus, a man successfully defended a murder charge when he shot plainclothes police officers who came to serve an arrest warrant at night, and were pounding on his back door. *People v. Lavac*, 192 N.E. 568 (Ill. 1934).

²⁵¹ For example, in 1989, in a nighttime raid, Florida police clad in dark clothing and black masks notified Charles DiGristine that they had a warrant to search his house by setting off a concussion grenade and breaking down the front door. BOVARD, *supra* note 248, at 236. As his wife screamed, he ran frightened to his bedroom to get his pistol. *Id.* An agent ran into his bedroom, and in the exchange of gunfire, the police officer was killed. *Id.* DiGristine was tried for the officer's murder but was acquitted. *Id.* The jury foreman commented "[h]e was totally petrified, and I would have been too. Myself, under the same circumstances, would have more than likely done the same thing, if not quicker and with more firepower." Joe Hallinan, *Gestapo-like Tactics Used in Drug Raids*, *DES MOINES REG.*, Nov. 6, 1993, at 1T, 2T.

raids are not a rare occurrence,²⁵² and when an unannounced entry does occur, innocent people at home can be victimized by nervous police executing the unannounced entry. For example, SWAT police broke into Robin Pratt's home unannounced to execute an arrest warrant on her husband.²⁵³ While searching the apartment, an officer rounded a corner and came upon Mrs. Pratt.²⁵⁴ The SWAT officer pointed his gun at her and ordered her to get down, and while she was complying, she looked up at the officer and said, "Please don't hurt my children."²⁵⁵ The officer then shot and killed Mrs. Pratt.²⁵⁶

The right to privacy in one's home is at the core of the Fourth Amendment.²⁵⁷ The Court has emphasized the importance of this right in a variety of circumstances.²⁵⁸ Some critics of the knock-and-announce rule argue that the residents of homes subject to search under warrant have no real expectation of privacy, since the officers have the right to enter after the announcement.²⁵⁹ However, this ignores the fact that unannounced entries by police can expose private and intimate activities of citizens.²⁶⁰ In addition, because the unan-

²⁵² See Joe Hallinan, *Drug Wars: Fervor Often Injures The Innocent*, TIMES-PICAYUNE (New Orleans), Sept. 26, 1993, at A20 (quoting a DEA official as saying that unsuccessful drug raids "happen all of the time," and a North Carolina police officer saying that the homes of innocents are invaded "every day in this business").

²⁵³ BOVARD, *supra* note 248, at 235.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *E.g.*, Payton v. New York, 445 U.S. 573, 585 (1980); United States v. United States District Court, 407 U.S. 297, 313 (1972) (entry of home is "chief evil against which the wording of the Fourth Amendment is directed"); Silverman v. United States, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.").

²⁵⁸ *E.g.*, United States v. James Daniel Good Real Property, 114 S. Ct. 492, 501 (1993) (civil forfeitures of real property); Soldal v. Cook County, 113 S. Ct. 538, 543 (1992) (seizure of home); Maryland v. Buie, 494 U.S. 325, 331, 336 (1990) ("protective sweep" of a home incident to an arrest); Welsh v. Wisconsin, 466 U.S. 740, 748 (1984) (warrantless drunk driving arrest at home); Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest); Camara v. Municipal Court, 387 U.S. 523 (1967) (municipal inspections).

²⁵⁹ Sonnenreich & Ebner, *supra* note 149, at 647. See also State v. Stevens, 511 N.W.2d 591, 598 (1994), *cert. denied*, 115 S. Ct. 2245 (1995).

²⁶⁰ An unannounced raid can expose people who are engaging in sexual intercourse or in various states of undress. See *supra* note 47.

This is especially likely when raids are conducted at night or at early morning hours. For example, Drug Enforcement Administration agents arrived at the home of Sina Brush just after dawn in the fall of 1991. Joe Hallinan, *Drug Wars: Fervor Often Injures The Innocent*, TIMES-PICAYUNE (New Orleans), Sept. 26, 1993, at A20. She heard a commotion outside, and right after she got out of bed to look, the door slammed open and agents flooded into her home. *Id.* The agents forced her and her daughter, both of whom were clad only in underwear, to kneel handcuffed in the middle of their main room while the officers searched the premises. *Id.* The officers did not let the women dress. See *id.* No drugs were found, but Ms. Brush described the experience thus, "[the officer guarding me in the

nounced entry is by police, victims of these searches feel a special sense of violation and fear.²⁶¹ When police do not know of specific facts that give them reason to believe that the occupants of a home will resist the officers or will frustrate the search, the police should not be allowed to subject citizens to these risks.

The state's primary interest in unannounced entries is that they allow police to take command of the search scene quickly and efficiently.²⁶² The benefits flowing from this are two-fold. First, it reduces the opportunity occupants have to destroy evidence.²⁶³ In many cases, particularly those involving narcotics, the targeted items are small and easily disposable.²⁶⁴ However, barging into a home unannounced is not necessary to prevent destruction of drugs that may be in that home.²⁶⁵ Less violent alternatives, such as shutting off the water to the house or using a ruse to gain entry, should be tried first.²⁶⁶

At heart, this choice of method is an efficiency choice. It is certainly more efficient for the police to kick in the front door than to shut off the water to a home or wait to capture the owner outside. However, efficiency concerns do not necessarily override Fourth Amendment interests. In fact, the Supreme Court specifically re-

main room] placed himself at an angle where he could see my whole body exposed and he was just leering at me," she said. "He was sitting there with his hands behind his head and his feet stretched out in a chair . . . and I felt that was a violation of my female self." *Id.*

²⁶¹ The Ninth Circuit expressed the terror as follows:

The fear of a smashing in of doors by government agents is based upon much more than a concern that our privacy will be disturbed. It is based upon concern for our safety and the safety of our families. Indeed, the minions of dictators do not kick in doors for the mere purpose of satisfying some voyeuristic desire to peer around and then go about their business. Something much more malevolent and dangerous is afoot when they take those actions. It is that which strikes terror into the hearts of their victims. The [F]ourth [A]mendment protects us from that fear as much as it protects our privacy.

United States v. Becker, 23 F.3d 1537, 1540 (9th Cir. 1994). See also *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

²⁶² *Allegro*, *supra* note 238, at 562.

²⁶³ *State v. Stevens*, 511 N.W.2d 591, 595 (Wis. 1994), *cert. denied*, 115 S. Ct. 2245 (1995).

²⁶⁴ *Id.* Standard plumbing allows an offender to toss drug evidence down the toilet, as Wilson did in this case. See also *United States v. Keene*, 915 F.2d 1164, 1168-69 (8th Cir. 1990), *cert. denied*, 498 U.S. 1102 (1991).

²⁶⁵ See *Garcia*, *supra* note 84, at 714 (shutting off water, covertly installing mesh in the pipes to catch drugs, using a ruse to gain entry, and apprehending the owner of the dwelling outside prior to entry).

²⁶⁶ *Id.* Though the Court has reserved the question of whether entry via ruse violates the knock-and-announce rule, *Sabbath v. United States*, 391 U.S. 585, 590 n.7 (1968), the seven Federal Circuit Courts which have considered the question have unanimously approved of ruses. *E.g.*, *United States v. Contreras-Ceballos*, 999 F.2d 432, 435 (1992) (agent posing as Federal Express delivery driver did not violate knock-and-announce rule). *Cf.* *Lewis v. United States*, 385 U.S. 206 (1967) (approving of police undercover entry into drug dealer's home to buy drugs).

jected an attempt to use an efficiency argument to justify a Fourth Amendment intrusion in *Mincey v. Arizona*.²⁶⁷ The *Mincey* court strongly stated that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."²⁶⁸ Thus, the efficiency argument should not carry any more weight in the context of an unannounced entry, especially in light of the interests served by the knock-and-announce rule.²⁶⁹

The second state interest no-knock entries serve is officer safety. The Court considers the safety of officers serving a valid warrant a "weighty" interest.²⁷⁰ An officer executing a warrant is most vulnerable when attempting to enter a house.²⁷¹ Although the officer's position is often known by those inside, since the officer will probably be near a door, the officer does not know the location of the house's occupants.²⁷² The officer is further disadvantaged by not knowing the layout of the dwelling, which can provide hiding places for occupants who are determined to resist.²⁷³ Forcing an officer to announce his presence also can give occupants time to arm themselves and prepare for confrontation.²⁷⁴ To minimize these risks, and to promote the legitimate interest of the state in enforcing drug laws, police claim they need the discretion to pursue unannounced entries if they feel that is the safest option.²⁷⁵

However, as shown above,²⁷⁶ safety is not necessarily maximized by allowing officers to enter a house unannounced. Because of the large security and privacy interests at stake, police should not have unchecked discretion in this matter.

*Maryland v. Buie*²⁷⁷ illustrates how the Court may balance the interests of the police against the interests of the occupants of the house to be searched. In *Buie*, the Court held that officers could undertake a "protective sweep" of a suspect's home when serving an arrest warrant on a suspect accused of a violent crime.²⁷⁸ Although allowing

²⁶⁷ 437 U.S. 385, 393 (1978). See also *Steagald v. United States*, 451 U.S. 204, 222 (1981) (rejecting inconvenience to law enforcement officers as a justification for a warrantless arrest of a suspect in the home of a third party).

²⁶⁸ 437 U.S. at 393.

²⁶⁹ See *supra* notes 42-53, 247-60 and accompanying text.

²⁷⁰ *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1979) (per curiam).

²⁷¹ *Allegro*, *supra* note 238, at 566.

²⁷² *Id.*

²⁷³ See *Maryland v. Buie*, 494 U.S. 325, 333 (1990).

²⁷⁴ *Allegro*, *supra* note 238 at 566.

²⁷⁵ *Id.*

²⁷⁶ See *supra* notes 42-44, 245-51 and accompanying text.

²⁷⁷ 494 U.S. 325 (1990).

²⁷⁸ A protective sweep is a cursory visual search incident to arrest, confined to places where a person posing a danger to police officers can hide. A sweep protects officers

protective sweeps in some instances, the Court rejected the State's claim that a sweep is only a *de minimis* intrusion in the context of an arrest made pursuant to a warrant.²⁷⁹ The Court used the reasonable suspicion standard of *Terry v. Ohio*²⁸⁰ to determine when a protective sweep was constitutional.²⁸¹ In *Terry*, the Court sanctioned a "stop and frisk" search of a suspect for weapons, where the officer did not have probable cause to arrest the suspect.²⁸² *Terry*'s standard allows stop and frisk searches when a reasonable police officer would believe that he is dealing with a potentially armed and dangerous suspect.²⁸³ The officer's belief must be based on specific and articulable facts, rather than on an "inchoate and unparticularized suspicion or 'hunch.'"²⁸⁴ *Buie* applied the *Terry* standard in the context of the protective sweep, requiring that officers show specific, articulable facts "which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer" to believe that a person posing a threat is on the premises.²⁸⁵

Buie's balancing is appropriate in the knock-and-announce context. Both the protective sweep in *Buie* and the unannounced entry in *Wilson* occurred ancillary to police activity pursuant to a lawful warrant. When arrest warrants are served on suspects in violent crimes, the danger faced by officers is at least as great as that faced by officers serving a search warrant. The standard police should be required to meet to justify the intrusion of an unannounced entry should be no lower than the *Buie* standard. Thus, unannounced entries should be presumptively unreasonable. The presumption should be rebuttable only when the police can show specific, articulable facts that would allow a reasonable officer in the same situation to conclude that the occupants of the dwelling are already aware of the officers' authority and purpose, or that an unannounced entry is necessary for safety or to prevent the destruction of evidence. This standard respects state interests because it will allow police to take appropriate measures in cases where there are facts warranting an unannounced entry.²⁸⁶ By circumscribing police discretion, it protects the security, privacy, and

carrying out a lawful arrest from surprise attack. *Id.* at 327.

²⁷⁹ *Id.* at 333-34.

²⁸⁰ 392 U.S. 1 (1968).

²⁸¹ *Buie*, 494 U.S. at 334.

²⁸² *Terry*, 392 U.S. at 29.

²⁸³ *Id.* at 27.

²⁸⁴ *Id.* at 27; *Buie*, 494 U.S. at 332.

²⁸⁵ *Buie*, 494 U.S. at 334.

²⁸⁶ For example, facts sufficient to meet the *Buie* standard could come from prior dealings with a suspect, knowledge from a reliable source that the home to be searched is heavily fortified, or a suspect's threatening behavior at the time of the search.

property interests of the subject of the search.²⁸⁷

C. HISTORY AND EXPERIENCE SUPPORT A STRONGER RULE

A close look at the common law history of the knock-and-announce rule and recent Congressional experience with no-knock warrants supports a rule of presumptive unreasonableness for no-knock entries. In the *Wilson* opinion, Justice Thomas stated that "the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure."²⁸⁸ This understates the importance of the announcement rule in the early years of the republic. First, at common law, the scope of exceptions to the knock-and-announce rule was very limited.²⁸⁹ All of the early cases with exceptions to the knock-and-announce rule cited by Justice Thomas in the *Wilson* opinion involve situations where there were clearly specific, articulable facts supporting the decision not to announce.²⁹⁰ Moreover, the strong language of the treatises,²⁹¹ as well as the very small number of cases where there was no announcement, strongly suggests that announcement was the accepted procedure.²⁹² Indeed, officers were even liable for large civil damages for violations of the knock-and-announce rule.²⁹³ Finally, ten states had statutes requiring

²⁸⁷ The *Buie* standard would forbid the use of a generalized, blanket profile of a class of suspects to determine whether a forced entry should be attempted, as is done in some jurisdictions in drug cases. See *Ker v. California*, 374 U.S. 23, 61 (1963) (Brennan, J., concurring and dissenting) ("[I]f police experience in pursuing other narcotics suspects justified an unannounced police intrusion into a home, the Fourth Amendment would afford no protection at all."); *People v. Ouellette*, 401 N.E.2d 507, 510-11 (Ill. 1979) (rejecting blanket approach); *People v. Gastelo*, 432 P.2d 706, 708 (Cal. 1967) (blanket approach violates Fourth Amendment).

²⁸⁸ *Wilson v. Arkansas*, 115 S. Ct. 1914, 1918 (1995).

²⁸⁹ See *Ker*, 374 U.S. at 54 (Brennan, J., concurring and dissenting) (common law exceptions all have an implied notice requirement).

²⁹⁰ E.g., *Mahomed v. The Queen*, 4 Moore 239, 13 Eng. Rep. 293 (P.C. 1843) (use of violence against officers); *Allen v. Martin*, 10 Wend. 300 (N.Y. Sup. Ct. 1833) (pursuit); *Read v. Case*, 4 Conn. 166 (1822) (plaintiff threatened to shoot officers who would arrest him); *White & Wiltshire*, 81 Eng. Rep. 709 (K.B. 1619) (prior violence against officers serving process).

²⁹¹ See *supra* notes 56-59 and accompanying text.

²⁹² Cf. Note, *Announcement in Police Entries*, 80 YALE L. J. 139, 143 n.20.

²⁹³ A manual for justices of the peace in colonial America recounts the following case: A Man was outlawed for want of an Appearance: The Sheriff came to his House with a *Liat* and with a *Capias Utlegatum*, without the Privy of the Plaintiff, and the outward Door being open, he entered; then he and his company shut the Door, and drew their Swords, and went up to the Chamber where the Man was in Bed, and knocked gently at the Door, which was lock'd, but did not tell who they were, or for what they came; but the Door not being immediately opened, they broke it open, and arrested the Person . . . but the Sheriff was fined [£200] for this Outrage and Terror, and for not telling who he was, that the Door might be opened without Violence.

CONDUCTOR GENERALIS 57 (1722), reprinted in JUSTICES AND JURIES IN COLONIAL AMERICA (1972).

announcement at the time of the framing of the Fourth Amendment.²⁹⁴ The evidence is so compelling that William Cuddihy, the author of "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken"²⁹⁵ has concluded that unannounced entries were considered unreasonable by the Framers of the Fourth Amendment.²⁹⁶

Likewise, recent experience has convinced Congress that careful controls are needed for police conducting unannounced entries. In order to help fight the drug war, in 1970, Congress passed a controversial statute that allowed judges to issue no-knock warrants.²⁹⁷ During the four years that the statute was in force, the *Congressional Record* was filled with articles detailing abuses of the no-knock system, and stories of innocent people killed in no-knock searches.²⁹⁸ Dissatisfaction and concern over the constitutionality of the statute²⁹⁹ grew until the statute was repealed in 1974.³⁰⁰ Since that time, even though Congress has remained committed to fighting the drug war, it has never returned to the no-knock warrant. The experience of the 1970s shows that unannounced entries must be held in check.

D. THE IMPACT OF TREATING ANNOUNCEMENT AS ONLY A "FACTOR" IN THE REASONABLENESS ANALYSIS

Treating the presence or absence of an announced entry as a mere factor in the reasonableness equation gives a wide berth for judges to apply or ignore the rule as they choose. This will result in inadequate protection of the interests served by the knock-and-announce rule. The Court left to the lower courts the task of determining when a knock is or isn't required under the Fourth Amendment,³⁰¹ but did not give those courts any guidance as to how

²⁹⁴ Cuddihy, *supra* note 7, at 1511-13.

²⁹⁵ *Vernonia Sch. Dist. 47J v. Acton*, 115 S. Ct. 2386, 2398 (1995) (O'Connor, J., dissenting).

²⁹⁶ Cuddihy, *supra* note 7, at 1511.

²⁹⁷ Comprehensive Drug Abuse, Prevention, and Control Act of 1970, Pub. L. No. 91-513, § 509(b), 84 Stat. 1236, 1274 (1970).

²⁹⁸ Over 100 articles detailing abuses and mistakes in the execution of unannounced raids were published in the *Congressional Record*. See Garcia, *supra* note 84, at 704-05. The *New York Times* made a comprehensive investigation of no-knock entries in 1973, and reported the stories of a Virginia woman, previously the victim of a burglary, who shot a police officer who entered her apartment unannounced, and a California man who was shot by the police while he sat and held his infant child. Andrew H. Malcolm, *Violent Drug Raids Against the Innocent Found Widespread*, N.Y. TIMES, June 25, 1973, at A1.

²⁹⁹ *E.g.*, during the debates leading up to the repeal, Sen. Sam Ervin, the Harvard Law School-educated former North Carolina Supreme Court Justice, who led the fight to repeal the law, argued that the statute was unconstitutional. 120 CONG. REC. 22,884 (1974).

³⁰⁰ Controlled Substances Act of 1974, Pub. L. No. 93-481, § 3, 88 Stat. 1455, 1456 (1974).

³⁰¹ *Wilson v. Arkansas*, 115 S. Ct. 1914, 1919 (1995).

the Fourth Amendment should be applied in the knock-and-announce context.

In the face of this lack of direction from the Supreme Court, courts will necessarily look at previous precedent for direction.³⁰² For example, federal courts will look at the case law under 18 U.S.C. § 3109, because § 3109 has been construed to apply the common law announcement requirement and exceptions which formed the basis of the Court's opinion in *Wilson*.³⁰³ Likewise, state knock-and-announce statutes generally have been read to codify common law requirements.³⁰⁴ Since courts have already been interpreting common law knock-and-announce requirements, the Court has in effect told lower courts to continue applying the knock-and-announce rule as they have done in the past.³⁰⁵ Unfortunately, some courts have been very lax in enforcing the knock-and-announce rule.³⁰⁶ Additionally, the *Wilson* decision speaks favorably about exceptions to the knock-and-announce rule.³⁰⁷ In light of this, and the lack of a strong statement criticizing unannounced entries anywhere in the opinion, lower

³⁰² E.g., *Gaston v. City of Toledo*, 665 N.E.2d 264, 270 (Ohio Ct. App. Aug. 25, 1995).

³⁰³ See *Wilson*, 115 S. Ct. at 1917 n.3 (citing *Sabbath v. United States*, 391 U.S. 585, 591 n.8 (1968)). Federal circuits addressing the knock-and-announce issue post-*Wilson* have indeed looked at § 3109 caselaw to determine Fourth Amendment issues. See *United States v. Smith*, 63 F.3d 956, 962 (10th Cir. 1995) (cases under § 3109 "provide valid guidance" on Fourth Amendment claims), *vacated on other grounds*, 116 S. Ct. 900 (1996); *United States v. Gatewood*, 60 F.3d 248, 252 n.2 (6th Cir.) (dissent finds case law under § 3109 "instructive"), *cert. denied*, 116 S. Ct. 546 (1995); *United States v. Jewell*, 60 F.3d 20, 23 n.2 (1st Cir. 1995) (noting *Wilson's* and *Sabbath's* comment about § 3109).

³⁰⁴ *State v. Miskimins*, 435 N.W.2d 217, 219 n.2 (S.D. 1989) (knock-and-announce statutes codify common law). See also, e.g., *Moore v. State*, 650 So. 2d 958, 960 (Ala. Crim. App. 1994) (ALA. CODE § 15-5-9 (1990) codifies common law), *cert. denied*, 115 S. Ct. 1361 (1995); *Belton v. United States*, 647 A.2d 66, 67 (D.C. 1994) (same, D.C. CODE ANN. § 33-565(g) (1993)), *cert. denied* 115 S. Ct. 1383 (1995); *People v. Gonzales*, 259 Cal. Rptr. 846, 848 (Cal. Ct. App. 1989) (same, CAL. PENAL CODE § 1531 (West 1989)); *State v. Sakellson*, 379 N.W.2d 779, 781-82 (N.D. 1985) (same, N.D. CENT. CODE § 29-29-08 (1990)).

³⁰⁵ See *Commonwealth v. Wornum*, 656 N.E.2d 579, 581 (Mass. November 3, 1995) (after determining that an unannounced entry was not unreasonable under common law principles, the court notes *Wilson* and states that the entry was not unreasonable under the Fourth Amendment for the same reasons as in the common law analysis).

³⁰⁶ E.g., *United States v. Knapp*, 1 F.3d 1026, 1030-31 (10th Cir. 1993) (finding no exigent circumstances, but holding a 10 second delay after knocking with no response sufficient to find a constructive refusal under 18 U.S.C. § 3109; forced entry reasonable even though officers knew Knapp was an amputee who could not move quickly); *United States v. Moore*, 956 F.2d 843, 849-51 (8th Cir. 1992) (finding no exigent circumstances to justify a violation of 18 U.S.C. § 3109, the court applies a "good faith" exception to knock requirement).

³⁰⁷ *Wilson*, 115 S. Ct. at 1919 (the state's exigent circumstances arguments "may well provide the necessary justification for the unannounced entry in this case"). Moreover, the opinion surveys the common law exceptions to the knock-and-announce rule, *Id.* at 1918-19, but doesn't survey the policies in favor of the knock-and-announce rule or explain when an unannounced entry *would* be unreasonable.

courts may not be inclined to strengthen their enforcement of the knock-and-announce rule.³⁰⁸

The future of the knock-and-announce rule is further clouded by other recent Supreme Court action on the issue. In particular, the Supreme Court denied certiorari in *State v. Stevens* less than ten days after the decision in *Wilson*.³⁰⁹ *Stevens* issued a blanket rule that police need never knock-and-announce when they are looking for "evidence of drug dealing."³¹⁰ The exception in *Stevens* exempts a large and important category of searches from the coverage of the knock-and-announce rule. At a minimum, the denial of certiorari suggests that the Court does not believe that such a limitation presents a serious Fourth Amendment problem. Courts that have been loosely applying the knock-and-announce rule may take the "broad" exceptions in the *Wilson* rule and the denial of certiorari in *Stevens* as a signal that they may continue to apply the knock-and-announce rule loosely.³¹¹

VI. CONCLUSION

In *Wilson v. Arkansas*, the Supreme Court held that the knock-and-announce rule is only one factor in determining whether a search is reasonable under the Fourth Amendment. The Court came to its determination by looking only at the common law background of the knock-and-announce rule. In doing so, the Court's decision undervalued the important personal security and privacy interests served by police announcement. A balancing of the interests involved, coupled with a proper reading of the history of the rule, shows that a stronger rule is necessary to protect the interests at stake. Instead of making the knock-and-announce rule a factor in the reasonableness equation, the Court should have held that unannounced entries into homes are presumptively unreasonable, unless the police know that the occupant of the home is aware of their purpose, or the police can show reasonable suspicion that announcement would lead to violence or the destruction of evidence. However, the Court announced the constitutionality of the rule in such a mild way, and with so little guidance, that the Court's decision leaves important Fourth Amendment concerns subject to erosion.

MARK JOSEPHSON

³⁰⁸ The Court's holding puts the knock requirement "among the factors to be considered in assessing the reasonableness of a search." *Id.* at 1918. The Court says that "in some circumstances an unannounced entry into a home *might* be unreasonable," but never suggests when that would be the case. *Id.* (emphasis added).

³⁰⁹ *State v. Stevens*, 511 N.W.2d 591 (Wis. 1994), *cert. denied*, 115 S. Ct. 2245 (1995).

³¹⁰ *Id.* at 597.

³¹¹ *E.g.*, *Smith v. Farley*, 59 F.3d 659, 667 (7th Cir. 1995) (noting *Wilson's* "broad exception for exigent circumstances"), *cert. denied*, 116 S. Ct. 935 (1996).